

UNITED STATES COURT OF APPEALS
Filed 12/17/96
TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ROBERT HERNANDEZ,

Defendant-Appellant.

No. 95-3401
(D.C. No. 95-CR-40024)
(D. Kan.)

ORDER AND JUDGMENT*

Before **SEYMOUR**, Chief Judge, **KELLY** and **LUCERO**, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. See Fed. R. App. P. Submitted without oral argument.

Robert Hernandez pled guilty to possession with intent to distribute marijuana, preserving his right to appeal the district court's denial of his motion

*This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions 10th Cir. R. 36.3.

to suppress his statement and other evidence. In reviewing the district court's refusal to suppress the evidence, we must view the evidence in the light most favorable to the government, and we are required to uphold the court's findings of fact unless they are clearly erroneous. United States v. Smythe, 84 F.3d 1240, 1242 (10th Cir. 1996).

The district court denied the motion to suppress in a lengthy Memorandum and Order filed May 18, 1995. Since that time, this court decided United States v. Botero-Ospina, 71 F.3d 783 (10th Cir. 1995) (en banc), which clearly supports the district court's conclusion that the stop in the present case was not pretextual. We have reviewed Mr. Hernandez' other contentions in light of the record, and we are not persuaded that the district court erred. We therefore AFFIRM the judgment of the district court substantially for the reasons given by the district court in its Memorandum and Order, as modified by our opinion in Botero-Ospina.¹

ENTERED FOR THE COURT

Stephanie K. Seymour
Chief Judge

¹On November 13, 1996, Mr. Hernandez filed a Motion for Appointment of Counsel which we construe as a motion asking us to replace his present counsel. We deny the motion.